

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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	: :	DOC #: 3/3/17
MARIA FRINET CANTILLO BURGOS,	: :	DATE FILED: 16-Cr-6531
	: :	08 Cr. 1111-03
Petitioner,	: :	<u>MEMORANDUM OPINION</u>
-v-	: :	<u>AND ORDER</u>
UNITED STATES OF AMERICA,	: :	
	: :	
Respondent.	: :	
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DENISE COTE, District Judge:

On March 11, 2011, Maria Frinet Cantillo Burgos ("Burgos") was sentenced principally to a term of imprisonment of 135 months. The Court determined that the guidelines range, based on an offense level of 33 and a Criminal History Category of I, was 135 to 168 months in prison. The guidelines calculation did not include any role adjustment. At sentencing, the Government described that Burgos "had a substantial and direct role, as detailed in the government's submission, in gathering up the heroin and fulfilling her brother, Felix Cantillo Burgos', orders." The Pre Sentence Report states that Burgos is responsible for "conspiring to import and distribute at least 30 kilograms of heroin." Pursuant to a written plea agreement, Burgos waived her right to appeal or collaterally challenge any sentence at or below 168 months' imprisonment.

On August 16, 2016, Burgos filed a petition pursuant to 28 U.S.C. § 2255 seeking resentencing. She argues that she is entitled to receive the benefit of Amendment 794 to the Sentencing Guidelines, U.S.S.G. App. C. Amend. 794 (effective November 1, 2015), which the Ninth Circuit has applied retroactively in the context of a direct appeal. See United States v. Quintero-Leyva, 823 F.3d 519, 522 (9th Cir. 2016). On September 23, 2016, this Court construed the petition as a motion for resentencing pursuant to 18 U.S.C. § 3582(c)(2). The Court ordered that the Government and the Probation Department each submit a brief by October 27, 2016, regarding whether Burgos' August 16, 2016 petition may be treated as a § 3582(c)(2) motion, whether Burgos may obtain post-conviction relief pursuant to this motion, and whether Burgos is otherwise entitled to benefit from the retroactive application of Amendment 794. Burgos' response, if any, was due by December 9, 2016. Burgos submitted no response.

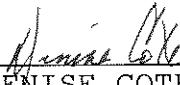
For the reasons explained in United States v. Morales-Perez, No. 11cr00881-01 (DLC), 2016 WL 6426394 (S.D.N.Y. Oct. 27, 2016), Burgos' motion for resentencing is denied. The Guidelines Manual lists the amendments that the Sentencing Commission has decided shall be applied retroactively, and Amendment 794 is not listed. U.S.S.G. § 1b1.10(d). Therefore, the Court has no authority to reduce Perez' sentence under §

3582(c)(2). Further, Quintero-Levya addressed Amendment 794 in the context of a direct appeal, and is therefore inapposite to a case not on direct appeal. See Morales-Perez, 2016 WL 6426394, at \*2. Accordingly, it is hereby

ORDERED that Burgos' August 16, 2016 motion for a sentencing reduction pursuant to Amendment 794 and § 3582(c)(2) is denied.

IT IS FURTHER ORDERED that Burgos has not made a substantial showing of a denial of a federal right and, therefore, a certificate of appealability shall not be granted. Hoffler v. Bezio, 726 F.3d 144, 154 (2d Cir. 2013); Tankleff v. Senkowski, 135 F.3d 235, 241 (2d Cir. 1998); Rodriquez v. Scully, 905 F.2d 24, 24 (2d Cir. 1990). Pursuant to 28 U.S.C. § 1915(a)(3), any appeal from this Order would not be taken in good faith. Coppedge v. United States, 369 U.S. 438, 445 (1962).

Dated: New York, New York  
March 2, 2017

  
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DENISE COTE  
United States District Judge

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